of one's land, FCC regulation of the use of one's spectrum that is contrary to the goals of the Communications Act can result in a taking if it bars the owner from making any beneficial use of its spectrum. The application of the prior satellite licensing requirement has caused a per se, categorical taking, as defined in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), of TelQuest's property interest in the DBS spectrum by denying it any beneficial use in the United States.

Nothing in the federal regulatory scheme precludes a person from acquiring a property interest in spectrum by reason of investment of time and money in application of that resource to productive use. The Communications Act requires the FCC to issue licenses in order to regulate "the use" of the spectrum,[15] it does not extricate it from the per se, categorical takings analysis of Lucas v. South Carolina Coastal Council.

As discussed above, the right to obtain an FCC license to use one's spectrum is also a property interest protected by the Fifth Amendment to the extent that such a grant is mandated by the "existing rules or understandings" embodied in the Communications Act. When, as in TelQuest's case, a regulation that declares "off-limits" all economically productive or beneficial use of a person's spectrum goes beyond what the relevant principles of the Communications Act would dictate, compensation must be paid to sustain it. See Lucas, 112 S.Ct. at 2901.

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[15] 47 U.S.C.§ 301; see also Columbia Broadcasting System, Inc. V. Democratic National Comm., 93 S.Ct. At 2093 (distinguishing between government regulation of the use of broadcast spectrum and outright government ownership of spectrum).

The Lucas case involved two residential lots on a South Carolina barrier island, where the owner intended to build single-family homes such as those on the immediately adjacent parcels. However, the state legislature enacted a statute which barred the owner from erecting any permanent habitable structures on his land for the purpose of protecting people and property from storms, high tides and beach erosion. The Supreme Court held that when the owner of property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. See Lucas, 112 S.Ct. at 2895.

The analysis in Lucas demands the same result here. Before TelQuest filed its earth station applications, the DBS spectrum using the 91° W.L. orbital position to provide video programming to the United States had not been allocated for such use and effectively belonged to no one. Like the property owner in Lucas, TelQuest has invested in the productive use of its property. TelQuest invested substantial time and millions of dollars in hiring employees, acquiring equipment and leasing facilities and prosecuting its earth station applications in order to apply its spectrum to productive use. TelQuest is the first and only entity that has made such investment for purposes of using the DBS spectrum to access satellites located in the 91° W.L. orbital position to provide video programming to the United States. TelQuest, therefore, acquired a property interest in this spectrum.

TelQuest properly filed FCC Form 493 applications demonstrating that granting it licenses to use its DBS spectrum was required by the public interest standards set forth in the Communications Act. In Lucas, homes were allowed to be built on adjacent property.

In TelQuest's case, the Commission had already granted licenses to use the DBS frequencies to others, but from adjacent orbital locations. TelQuest, therefore, had a right to obtain licenses to use its spectrum that was protected by the Fifth Amendment.

The International Bureau summarily dismissed TelQuest's applications invoking the prior satellite licensing requirement, which the Commission has now incorporated into its new FCC Form 312. That regulation has prohibited TelQuest from making any beneficial use of its DBS spectrum, just as the state statute in Lucas required the property owner to keep his land idle. As discussed above, that regulation puts TelQuest in a classic Catch-22 because a Canadian satellite license is conditional upon an FCC license, which the FCC will not grant until TelQuest has satisfied all conditions of such a Canadian satellite authorization, including obtaining an FCC license.

TelQuest's constitutionally-protected entitlement -the right to obtain an FCC license and to provide video programming to the American people-has been completely frustrated by this regulation. By requiring TelQuest to sacrifice all economically beneficial uses of its DBS spectrum without just compensation, the Commission has violated the Takings Clause of the Fifth Amendment. To remedy this violation, the Commission should rescind its prior satellite licensing requirement and reinstate and grant TelQuest's earth station applications. Lucas, 112 S.Ct. at 2901, n. 17.

c. THE COMMUNICATIONS ACT AND REGULATORY FLEXIBILITY ACT.

i. The Report and Order Violates the Communications Act and the Regulatory Flexibility Act by Creating a New Market Entry Barrier for Women-Owned Small Businesses.

Pursuant to §§ 257 and 309(j) of the Communications Act, it is the duty of the Commission to eliminate market entry barriers for small businesses and women-owned businesses. 47 U.S.C. §§ 257 and 309(j). In adopting new regulations, the Regulatory Flexibility Act requires the Commission to consider significant alternatives that minimize the impact on small businesses. 5 U.S.C.§ 603, et seq. These standards are part of the "existing rules and understandings" that secure TelQuest a property right to obtain earth station licenses to use its DBS spectrum.

Rather than provide regulatory flexibility to eliminate the DBS market entry barriers confronting TelQuest, the Commission created a new market entry barrier for this small, women-owned U.S. business by adopting a prior satellite licensing requirement for earth station applications. While identifying TelQuest as only one out of five small satellite businesses, the Commission failed to adopt any alternatives minimizing the impact of the prior satellite licensing requirement, which in TelQuest's case, has completely barred it from entering the market. Report and Order, slip op. at 49-52. The Commission failed to consider granting TelQuest's earth station applications conditional upon satisfying the conditions of the related Canadian satellite license. Such an alternative would extricate TelQuest from the current Catch-22 in which this new Commission regulation has placed it. TelQuest urges the Commission to eliminate the

market entry barrier which it has improperly invoked and expeditiously grant TelQuest's applications. Granting a conditional license would allow TelQuest to move forward in gaining access to capital which has been recognized as critical for small businesses.

d. THE FIRST AMENDMENT OF THE U.S. CONSTITUTION.

i. The Prior Satellite Licensing Requirement Unconstitutionally Infringes on TelQuest's First Amendment Right to Freedom of Speech.

The First Amendment provides that "Congress shall make no law...abridging the freedom of speech." In considering content-neutral regulation of cable operators, the Supreme Court has applied the intermediate scrutiny standard set forth in United States v. O'Brien, 88 S.Ct. 1673 (1968).[16] Under the test articulated in O'Brien, a content-neutral time, place and manner restriction will pass constitutional muster if: (1) it furthers an important or substantial government interest; (2) if the government interest is unrelated to the suppression of free expression; and (3) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id. at 2468, quoting O'Brien, 88 S.Ct. at 1679. In addition, the Court will consider whether "ample alternative channels of communication" exist. US West, Inc. v. U.S., 48 F.3d 1092, 1100 (9th Cir. 1995).

At least five justices on the D.C. Circuit agree that the intermediate scrutiny standard applied to cable operators should be applied to DBS, not the relaxed standard of scrutiny that the Court has applied to the traditional broadcast media. "DBS is not

[16] Turner Broadcasting Systems v. FCC, 114 S.Ct. 2445, 2469 (1994).

subject to anything remotely approaching the 'scarcity' that the Court found in conventional broadcast in 1969 and used to justify a peculiarly relaxed First Amendment regime for such broadcast...Accordingly Red Lion should not be extended to this medium...DBS falls on the cable rather than the broadcast side of the line." Time Warner Entertainment Co., 1997 WL 47179. While DBS can provide hundreds of channels for viewing nationwide, there are only 4 national broadcast TV channels.

Upon consideration of these factors, it is clear that the prior satellite licensing requirement is an unconstitutional infringement on TelQuest's First Amendment rights. This requirement has completely foreclosed TelQuest from exercising its First Amendment right to speak to the American people using a DBS service. All of the DBS orbital positions assigned to the United States by international agreement have already been allocated to other companies. TelQuest has no alternative other than using a Canadian orbital position to provide coverage for the entire continental United States.

Enforcement of the prior satellite licensing requirement, and the resulting barrier to TelQuest's entry into the DBS market, not only fails to promote any important or substantial government interest, but also directly contradicts the stated goal of Congress and the duty of the Commission to promote the entry of small, women-owned U.S. businesses into the telecommunications industry. The infringement on TelQuest's First Amendment freedoms is much greater than necessary as the Commission could conditional TelQuest's earth station licenses upon the satisfaction of the conditions of the related satellite license. Accordingly, the Commission should allow TelQuest to exercise its First Amendment right to freedom of speech by granting its earth station applications.

2. TelQuest Will Be Irreparably Harmed if the Stay is Not Granted.

TelQuest will be irreparably harmed if the Commission's Report and Order is not stayed to the extent necessary to reinstate and grant TelQuest's earth station applications. The loss of fundamental constitutional rights for even minimal periods of time, unquestionably constitutes irreparable injury. Elrod v. Burns, 96 S.Ct. 2673, 2690 (1976); National Treasury Employees Union v. United States, 927 F.2d 1253, 1254 (D.C. Cir. 1991).

The prior satellite licensing requirement, as now to be incorporated into the new FCC Form 312 for earth station applications, was the sole basis upon which the International Bureau refused to consider the merits of TelQuest's earth station applications and summarily dismissed them. If such a stay is not granted, the injury to TelQuest is certain to occur as the prior satellite licensing requirement will prevent the Commission from reinstating and granting TelQuest's applications. Without an earth station construction permit, TelQuest will be denied a great economic opportunity to use its DBS spectrum to participate in the provision of new technology and services to the public.

The injury that TelQuest will ultimately suffer if this stay is not granted will be irreparable. Adequate compensation or corrective relief will be unavailable at a later date if this stay is not granted in time to avoid this injury.

3. Others Will Not Suffer Substantial Harm by Grant of the Stay.

No other parties will suffer harm from a grant of the limited stay requested herein. To the contrary, other small businesses will be relieved of the market entry barrier created

by the requirement to satisfy all the conditions of a satellite license prior to obtaining an earth station construction permit. Other parties will continue to be able to file their satellite and earth station applications using the current FCC Form 493. The inconvenience in not using the new FCC Form 312 is minor when compared to the harm that would result if TelQuest is forever barred from providing DBS service to the United States.

4. A Stay Will Serve the Public Interest.

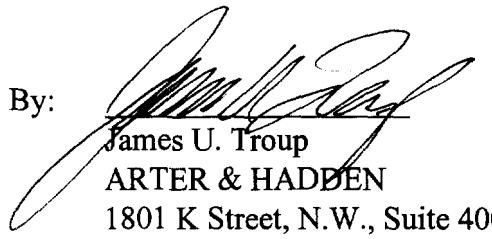
Clearly, the public interest is best served by granting this limited stay. Granting a stay will enable the Commission to reinstate and grant TelQuest's earth station applications. This will permit TelQuest to use its DBS spectrum to provide the American public a video service not available today, DBS service that also offers local television programming. As already described above, 70% of Americans surveyed expressed a strong interest in TelQuest's new satellite service. The industry-wide impact of TelQuest's new competitive DBS system would be to cut average cable rates by 10%, increase the number of video programming subscribers by 600,000, generate as much as $5 billion in new spending on multichannel TV, and create as many as 100,000 new jobs in the United States.

III. CONCLUSION

For the foregoing reasons, TelQuest respectfully requests that the Commission stay its Report and Order and reinstate and grant TelQuest's earth station applications.

Respectfully submitted,

TELQUEST VENTURES, INC.

By: 

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March 12, 1997

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EXHIBIT ONE

Minister of Industry Ministre de l'Industrie

Ottawa, Canada K1A 0H5

The Honourable L'honorable
John Manley P.C., M.P. c.p., député

February 27, 1996

Mr. L.J. Boisvert
President and Chief Executive Officer
Telesat Canada
1601 Telesat Court
Gloucester, Ontario
K1B 5P4

Dear Mr. Boisvert:

This letter is in response to the request of Telesat Canada Inc. (Telesat) to use the Broadcast Satellite System (BSS) positions at 82°W and 91°W for Direct Broadcast Satellite (DBS) services in Canada and North America, as outlined in your written submissions to Industry Canada and as discussed with you and members of your staff recently. It should be noted that the operation of Canadian DBS satellites to serve North America is likely to require modification to the government's DBS/DTH satellite policy as stated last year. Nevertheless, we appreciate your desire for an early decision in this matter due to the very competitive DBS environment in the USA.

Therefore, I am pleased to advise you that I support in principle your proposal to utilize the 82°W and 91°W orbit positions and associated 500 MHz BSS bands (12.2 - 12.7 GHz) for a DBS service, as you have outlined.

The authorization of these orbital positions to Telesat would be done within my powers under the Radiocommunication Act, which provide flexibility to fix the terms and conditions for the development and operation of DBS satellites that would best support the public interest. The final terms and conditions for the authorization of DBS facilities could be affected by negotiations with foreign administrations as well as the Canadian stakeholders.

However, the conditions for support in principle of Telesat's request for Canadian orbit and spectrum resources are the following:

1) The DBS satellites would be owned and operated by Telesat, as set out in its proposal, in its capacity as a Canadian carrier under the Telecommunications Act, and would require radio authorization under the Radiocommunication Act;

2) DBS facilities shall be available on a first-come, first-served basis for use by those licensed or seeking licences under the Broadcasting Act to operate DBS broadcasting undertakings in Canada;

3) Provision of DBS satellite facilities in foreign countries would be subject to their approval under their domestic regulations and policies, and to the successful modifications to the ITU BSS Plan;

4) The authorization fees to be fixed under my authority for the DBS satellites would reflect the fair market value of the spectrum and orbit resources; and,

5) The support for this request is limited to the specific proposal by Telesat, and any change to this proposal which in my opinion is substantive, could lead to a re-evaluation of our support.

We understand that your proposal will require a technical modification to the ITU BSS Plans (RARC-83 plans), which will necessitate negotiations with affected foreign administrations and the concurrence of the ITU. We are prepared to effect these coordinations as expeditiously as possible, and will work closely with your staff. In addition to the five conditions stated above, my support in principle is premised upon and will be affected by:

a) the outcome of the GATS/NGBT expected at the end of April;

b) any required negotiations with the US administration and with any other involved country;

c) achieving any required modifications of the government's DBS/DTH satellite policy;

d) obtaining concurrence of affected countries through the ITU coordination process; and,

e) establishment of the appropriate fees for each of the orbital positions.

As noted earlier, I agree in principle with your proposal. Once all the requirements and premises outlined above have been met to my satisfaction, I would be prepared to issue a radio authorization to utilize the Canadian orbital positions and associated spectrum as outlined in your request. If you wish to proceed with this project in accordance with the foregoing please so confirm by letter. This will enable us to move forward immediately with the next steps. Should you have any additional comments or questions, my officials are available to respond to them at any time. This letter, setting out my support in priciple, is valid until March 1, 1998.

Yours very truly,

John Manley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 12, 1997, a copy of the foregoing Motion for Stay of TelQuest Ventures, Inc. was delivered, by hand delivery (as indicated by asterisk) and first-class mail postage pre-paid to the following:

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